

The Supreme Court's Role in the Growing School Choice Movement

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The expansion of school choice in elementary and secondary education, particularly in urban areas, is one of largest current educational reform movements sweeping the nation. This is true despite the fact that it is still too early for a consensus to develop about the educational benefits of increased choice.¹ Society always precedes schooling. Thus, major educational reforms pass in and out of favor depending on social conditions and how prevailing patterns of understanding interpret those conditions.² Among the most significant social developments influencing educational reforms are legal decisions. Since the Supreme Court is the final authority on constitutional law, its decisions influencing education are particularly significant in determining the direction of educational reform. This Article will discuss the role of the Supreme Court's decisions interpreting the Equal Protection Clause in the expansion of school choice. This Article seeks to focus attention upon the impact of the well-known fundamental shift that has occurred over the past thirty-five years in the way that the Supreme Court interprets the equal protection rights of black and other disadvantaged minority school children in the context of public education. These decisions by the Supreme Court have set up barriers and boundaries to educational reform that have made the expansion of school choice inevitable.

I. INTRODUCTION

There are three major considerations influencing the direction of public education reform directed toward increasing the performance for black and

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¹ See, e.g., Jeffrey R. Henig, *School Choice Outcomes*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 68, 89–101 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (noting the difficulties with ability of empirical data to answer the question about educational achievement resulting from increased choice); see also Gary Orfield, *Foreword* to ERICA FRANKENBERG & CHUNGMEI LEE, *CHARTER SCHOOLS AND RACE: A LOST OPPORTUNITY FOR INTEGRATED EDUCATION* 2–7 (2003) (stating that “there is no systematic research showing that charter schools perform better than public schools”).

² PETER COOKSON, *SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION* 9 (1994).

Latino³ school children, particularly in urban areas. The first involves three persistent achievement gaps in academic performance among American school children. Low-income children, on average, perform poorer than do their middle- and upper-income counterparts.⁴ Black, Latino and Native American children, on average, do not perform as well as non-Hispanic white and Asian children. Finally, children attending urban public schools, on average, are less educationally successful than are children attending schools in the suburbs. Children with all three of these characteristics struggle the most in our educational institutions. Given the disproportionate number of black and Latino school children attending predominantly minority, low-income, urban schools, these two racial/ethnic groups congregate at the losing end of America's educational performance spectrum. Racial/ethnic achievement gaps exist in most indicia of academic success, including performance on standardized tests, high school dropout rates, grade retention rates, and placement of students in tracking or ability skills groupings.⁵

The second consideration is the reality that racial and ethnic separation in public schools has been increasing for at least the past fifteen years.⁶ Furthermore, this increase is likely to continue into the foreseeable future. The scope and extent of school desegregation was principally the product of the Supreme Court's interpretations of the Equal Protection Clause. Paradoxically, federal court decisions interpreting the Equal Protection Clause are also a large factor in the re-segregation of public schools. Figures from Harvard's Civil Rights Project show that the percentage of black students attending majority-minority schools has increased from its all-time low of 62.9% in 1980–1981, to 68.8% in the 1996–1997 school year, 71.6% in 2000, and 73% in 2003–2004.⁷ The percentage of blacks in hyper-segregated schools (schools that are 90% or more minority) has also increased from its low point of 32.5% in the 1986–1987 school year, to 35% in 1996–1997, 37.4% in 2000, and 38% in 2003–2004.⁸ For Latinos, segregation has been increasing since the 1968–69 school year.⁹ At that

³ This Article will use the term "Latino" as the appropriate designation. However, many reports and studies of the educational situation of "Latinos" use the term "Hispanic" instead. When a given report or study referred to uses the term "Hispanic" it will also be used in this Article.

⁴ KEVIN BROWN, *RACE, LAW & EDUCATION IN THE POST DESEGREGATION ERA* 11–12 (2005).

⁵ See *infra* Part II.A–D.

⁶ See ERICA FRANKENBERG ET AL., *A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?* 30–31 (2003).

⁷ Gary Orfield & Chungmei Lee, *New Faces, Old Patterns? Segregation in the Multiracial South*, in *THE CIVIL RIGHTS PROJECT* 9 (Harv. Univ. ed., 2005).

⁸ For 1980–81, 1996–97, and 2000 figures see FRANKENBERG ET AL., *supra* note 6, at 32–34. For figures for 2003–04, see Orfield & Lee, *supra* note 7, at 10.

⁹ FRANKENBERG ET AL., *supra* note 6, at 34.

time 54.8% of Latino students were in majority-minority schools and only 23.1% were in hyper-segregated schools.¹⁰ In 1991–1992, 73% of Latinos were in predominately minority schools and 34% were in hyper-segregated schools.¹¹ By 2003–2004, the percentage in majority-minority schools had increased to 77%, with the percentage in hyper-segregated schools increasing to 39%.¹²

Third, over the past thirty years federal courts have shifted the background assumptions for interpreting the equal protection rights of school children. Fifty years ago, when the Court handed down its decision in *Brown v. Board of Education*,¹³ it viewed the equal protection rights of black school children with special concern about improving their educational environment. Over the past thirty years, however, the Court increasingly has embraced the view that the equal protection rights of black school children—indeed, all school children—should be based on a notion that all public school students should be treated as individuals. One consequence of this fundamental shift in the way the Supreme Court interprets the Equal Protection Clause is the above noted resegregation of public schools. Two other significant consequences of this fundamental shift are shaping the direction of education reform.¹⁴ First, under the latter background assumptions—as opposed to the former—the determination of unconstitutional discrimination is based upon the motives that generate given educational policies and practices, as opposed to their discriminatory effect. Educational policies and practices motivated by legitimate educational considerations which, nevertheless, have a disparate negative effect on the educational opportunities of black and other racially or ethnically disadvantaged school children, do not violate the Equal Protection Clause.¹⁵ Rather the disparate effect is viewed, for

¹⁰ *Id.*

¹¹ Orfield & Lee, *supra* note 7, at 9–10.

¹² *Id.*

¹³ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁴ KEVIN BROWN, RACE, LAW & EDUCATION IN THE POST DESEGREGATION ERA 273–96 (2005).

¹⁵ See, e.g., *Grimes v. Sobol*, 832 F. Supp. 704 (S.D.N.Y. 1993), *aff'd*, 37 F.3d 857 (2nd Cir. 1994) (granting school board's motion to dismiss plaintiff's Equal Protection Clause violation allegations that City Board of Education failed to change public school curriculum to reflect existence and contributions of blacks and did not make progress in implementing more inclusive curriculum because claim did not support inference of purpose and intent to discriminate against black students); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022 (9th Cir. 1998) (rejecting equal protection challenge to a curricular decision that a black student could be compelled to read *The Adventures of Huckleberry Finn*, by Mark Twain, despite the repeated use of the derogatory term "nigger" because complaint lacked sufficient allegations of facts necessary to sustain claim of discriminatory intent); see also *GI Forum v. Texas Educ. Agency*, 87 F. Supp. 667 (W.D. Tex. 2000) (where plaintiffs did not even pursue an equal protection challenge to the requirement that for students to receive their high school diploma, they must pass the Texas Assessment of Academic Skills, despite demonstrating a disparate impact on minority children).

equal protection purposes, as the unfortunate consequence of race-neutral decision making. The result of this shift is that legal action challenging such practices will rarely be successful.¹⁶ The second consequence of this shift is to

¹⁶ The Supreme Court recently foreclosed the possibility that private rights of action under Title VI exist. Such actions could have allowed for challenges to educational policies and practices that had a disparate negative impact on the educational opportunities of blacks or Latino school children regardless of discriminatory intent. *Alexander v. Sandoval*, 532 U.S. 275 (2001). Many equal protection challenges raised against educational policies and practices, such as tracking, high stakes testing, and curricular decisions also included a challenge or challenges under either or both § 601 and § 602 of the Civil Rights Act of 1964. See, e.g., *Grimes*, 832 F. Supp. 704; *GI Forum*, 87 F. Supp. 667. The 1964 Civil Rights Act, § 601, states that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . ." 42 U.S.C. § 2000d (2003). Section 602 of Title VI authorizes federal agencies to effectuate the provisions of § 601 by issuing rules, regulations or orders of general applicability. The Department of Justice, in an exercise of this authority, promulgated a regulation forbidding funding recipients to utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin. The Supreme Court has assumed that "regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601." *Alexander*, 532 U.S. at 281 ("Though no opinion of this Court has held that, five Justices in *Guardians [Ass'n v. Civil Serv. Comm'n of New York City]*, 463 U.S. 582 (1983)) voiced that view of the law at least as alternative grounds for their decisions.").

In the Supreme Court's 1974 opinion in *Lau v. Nichols*, 414 U.S. 563, 566 (1974), the Court held that a school system's failure to provide English language instruction to Chinese-speaking students denied them a meaningful opportunity to participate in the educational programs offered by the school district in violation of Title VI. *Id.* In the opinion, the Court noted that HEW guidelines declared that "[d]iscrimination is barred which has that effect even though no purposeful design is present." *Id.* at 568. But the Court's opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), raised serious questions about the discriminatory-effects holding in *Lau*. *Bakke*, 438 U.S. at 287. In *Bakke*, five members of the Court concluded that the standard for a Title VI violation ought to be the same as the standard for an equal protection violation. *Id.* In the Court's 1983 decision in *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582 (1983), the Court made clear that under *Bakke* only intentional discrimination was forbidden by § 601. *Guardian Ass'n*, 463 U.S. at 610–11 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring in judgment); *id.* at 612 (O'Connor, J., concurring in judgment); *id.* at 642 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting). The Court has also made it clear that there exists a private right of action under § 601 that allows private individuals to challenge actions of recipients of federal funds. See *Alexander*, 532 U.S. at 279 ("private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages"). Thus, if there is an Equal Protection Clause violation by a public school due to its engaging in intentional discriminatory conduct, a litigant can also assert a § 601 violation. The Supreme Court concluded in its 2001 decision in *Alexander*, however, that no private right of action exists to enforce the disparate impact regulations adopted pursuant to § 602. *Id.* at 293; see also *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002) (rejecting the argument that litigants could enforce Title VI regulations against state actors under 42 U.S.C. § 1983 cases).

limit the programs and policies that legislators and public school authorities can implement to attack the continuing racial achievement gaps. Even though the tremendous concerns about racial/ethnic achievement gaps are based upon demonstrated differences in racial/ethnic academic performance statistics, legislators and educators must generally seek to adopt race-neutral policies and practices to attack these continuing racial/ethnic achievement gaps.¹⁷

Given the above three considerations, politicians and educational strategists who want to reduce the existing racial/ethnic achievement gaps are increasingly forced to argue for policies and programs that are race-neutral and, therefore, can only indirectly attack the racial/ethnic achievement gaps, which are increasingly becoming obvious.¹⁸ One of the most significant race-neutral educational reform movements sweeping the country is increasing parental educational choices, both public and private. Although significant differences exist between public school choice and public funding of private education, both are born out of the same concerns. Despite the lack of consensus about the academic benefits of increased choice, its advocates generally assert that it will improve educational achievement, particularly of low-income, urban, minority students in a number of ways.¹⁹ Increased choice creates a competitive environment that forces schools to compete for students. Thus, increased school choice should produce new and innovative schools, including those that are particularly effective at responding to the educational needs of low-income, urban, minority students. In a Darwinian competitive environment those schools that cannot adequately educate the students in their charge will not survive. Schools that are successful will thrive and be imitated by others. Over time, this process-oriented approach to educational reform should benefit the least academically successful students the most.

II. RACIAL/ETHNIC ACADEMIC ACHIEVEMENT GAPS

In almost all important indicia of academic success, black and Latino school children lag behind their non-Hispanic white counterparts. These groups tend to underperform their non-Hispanic white counterparts on standardized tests.²⁰ Black and Latino school children are more likely to drop out of school before obtaining their high school diplomas than their non-Hispanic white counterparts.²¹ During their academic careers, black and Latino school children are also more likely than their non-Hispanic white counterparts to be retained in

¹⁷ See *infra* Part III.

¹⁸ See *infra* Part II.A–D.

¹⁹ See, e.g., THOMAS L. GOOD & JENNIFER S. BRADEN, *THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS AND CHARTERS* 105–10 (2000); COOKSON, *supra* note 2, at 128.

²⁰ See *infra* Part II.A.

²¹ See *infra* Part II.B.

a grade.²² In addition, black and Latino students are overrepresented in the lower academic tracks or achievement skills groups and underrepresented in the higher academic tracks or achievement skills groups.²³

A. Performance on Standardized Tests

The performance of black school children on standardized tests lags far behind that of their non-Hispanic white counterparts. For instance, according to the College Board's 2004 national report profiling SAT test takers, the gap between the SAT scores of blacks and that of non-Hispanic whites is 202 points (857 and 1059, respectively).²⁴ Through the 1970s and 1980s, the racial performance gap lessened.²⁵ However, the gap between the mean scores of blacks and non-Hispanic whites has widened by seventeen points over the past fifteen years.²⁶ Significant racial gaps between the performance of blacks and non-Hispanic whites also exist on the ACT. The average composite score of blacks on the ACT is 17.0 compared to the non-Hispanic white score of 21.9.²⁷ This gap has risen slightly over the past eight years.²⁸

While the ethnic gaps on both the SAT and ACT between the scores of whites and Latinos are not as large as the gap between blacks and whites, they are still considerable. On the SAT, Latinos are broken down into three different groups: Mexican Americans, Puerto Ricans, and Other Hispanics.²⁹ The

²² See *infra* Part II.C.

²³ See *infra* Part II.D.

²⁴ THE COLLEGE BOARD, 2004 COLLEGE-BOUND SENIORS: A PROFILE OF SAT PROGRAM TEST-TAKERS 6, available at http://www.collegeboard.com/prod_downloads/about/news_info/cbsenior/yr2004/CBS2004Report.pdf.

²⁵ In 1975–1976 the gap between the average SAT scores of blacks and whites was 258 (686 in comparison to 944). BLACK AMERICANS: A STATISTICAL SOURCEBOOK 108 (Louise L. Hornor ed., 1999).

²⁶ For the 1990–1991 assessment year, the gap was only 185 points (1031 as opposed to 846). In the 1996–1997 assessment year, the gap had increased to 195 points (1052 as opposed to 857) and in 1999–2000, it was 198 (1058 as opposed to 860). NAT'L CTR. FOR EDUC. STATISTICS, SCHOLASTIC ASSESSMENT TEST (SAT) SCORE AVERAGES BY RACE/ETHNICITY: 1986–1987 TO 2000–2001, available at <http://nces.ed.gov/programs/digest/d01/dt134.asp>.

²⁷ ACT, 2005 NATIONAL AND STATE SCORES: THE 2005 NATIONAL SCORE REPORT 3, tbl. 1, available at <http://www.act.org/news/data/05/pdf/t1-2.pdf>.

²⁸ For students graduating in 1997, the average ACT score for blacks was 17.1, compared to 21.7 for whites. This gap of 4.6 points is lower than the gap of 4.9 reported last year. See ACT, 2005 ACT NATIONAL AND STATE SCORES, THE 1997 ACT HIGH SCHOOL PROFILE REPORT—NATIONAL NORMATIVE DATA, tbl. 5, available at <http://www.act.org/news/data/97/t5-6-7.html>.

²⁹ See THE COLLEGE BOARD, *supra* note 24, at 6.

difference in scores between whites and Mexican Americans is 152 points, between whites and Puerto Ricans it is 151 points, and between whites and Other Hispanics it is 136 points.³⁰ On the ACT, Latinos are broken down into two groups instead of three: Mexican Americans/Chicanos and Puerto Ricans/Hispanics. The ethnic gap on the ACT for Mexican Americans was 3.5 and for Puerto Ricans it was 3.0.³¹

Because the ACT and SAT are tests taken only by students with college aspirations, to get a view of the existence of racial/ethnic gaps for a broader section of elementary and secondary students, it is necessary to focus on other standardized tests. The National Assessment of Educational Progress (NAEP) exams were created by Congress in 1969 to assess trends in progress of elementary and secondary students in certain academic areas, including reading and math. Since 1971, three age groups of school students—ages nine, thirteen, and seventeen—have been tested. In the subject of reading, from 1971 to 1988, blacks in all three age groups showed progress in closing the gaps with white students.³² Thereafter, these gaps began to widen as the scores of all black age groups fell while those of whites showed a modest increase.³³ However, there was some good news in the summer of 2005 regarding the test score gaps of blacks when the latest results of the NAEP scores were released. The racial gap for nine-year-olds fell to its lowest level ever recorded under the NAEP reading tests, the gap for thirteen-year-olds fell to its lowest point since the early 1990s, and the gap for seventeen-year-olds fell as well, though not as dramatically.³⁴

³⁰ *Id.* This represents an increase in the gap since 1994 of 17 points for Mexican Americans, a reduction of 5 points for Puerto Ricans, and an increase of 18 points for Other Hispanics.

³¹ The composite ACT scores of American Indians were 18.7, Mexican Americans 18.4, Asian Americans 22.1, and Other Hispanics 18.9. ACT, 2005 NATIONAL AND STATE SCORES, *supra* note 27.

³² NAT'L CTR. FOR EDUC. STATISTICS, STATUS AND TRENDS IN THE EDUCATION OF HISPANICS 49 (2003), available at <http://nces.ed.gov/Pubs2003/2003008.pdf>. Test scores for Latinos were not separately listed in 1971. The test scores of black students increased while those of white students remained essentially the same. The average scores of nine-year-old black students increased from 170 to 189; thirteen-year-olds, from 222 to 243; and seventeen-year-olds from 239 to 274. The corresponding scores of whites were 214 to 218 (the racial gap was reduced from 44 to 29), 261 to 261 (the racial gap reduced from 39 to 18), and 291 to 295 (the racial gap was reduced from 52 to 21). NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 26.

³³ NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 26. From 1988 to 1999 the scores of black nine-year-olds decreased from 189 to 186, thirteen-year-olds from 243 to 238, and seventeen-year-olds from 274 to 264. The corresponding scores of whites went from 218 to 221 (the racial gap increased from 29 to 35), 261 to 267 (the racial gap increased from 18 to 29), and 295 to 295 (the racial gap increased from 21 to 31). *Id.*

³⁴ NAT'L CTR. FOR EDUC. STATISTICS, TRENDS IN AVERAGE READING SCALE SCORES BY RACE/ETHNICITY: WHITE-BLACK GAP, available at

Despite these reductions on the NAEP reading test score gaps, the average thirteen-year-old white student still scored higher than the average seventeen-year-old black student.³⁵

With respect to math scores, the achievement gaps between blacks and whites also fell during the 1970s and 1980s, but showed more stabilization in the 1990s.³⁶ The scores released in the summer of 2005 showed that while black seventeen-year-olds still score lower on the NAEP math test than do white thirteen-year-olds, the gaps in math fell for all three black age groups.³⁷ The gap for black nine-year-olds is 23 points, the lowest on record.³⁸ The gap for black thirteen-year-olds decreased to 27 points, the lowest since 1990. The gap for seventeen-year-olds decreased to 28 points, a reduction of three points in five years.³⁹

For Hispanics, the recent news was not as encouraging. The gap on the reading tests for nine-year-olds did close to 21 points, which is its lowest level since the NAEP reading tests started to report Hispanics as a separate group in 1975. But the gaps for thirteen-year-olds increased slightly over the past five years to 24 points (from 23 points) with the gap for seventeen-year-olds increasing significantly to 29 points (from 24 points).⁴⁰ In other words, just as the average thirteen-year-old white student scores higher on the NAEP reading test than does the average black seventeen-year-old student, the average white student also scores higher than does the average seventeen-year-old Hispanic

<http://nces.ed.gov/nationsreportcard/ltr/results2004/sub-reading-race.asp>. For 2004, the score of black nine-year-olds was 200, for thirteen-year-olds 244, and seventeen-year-olds was 264. The corresponding scores of whites were 226 (for a racial gap of 26), 266 (for a racial gap of 22), and 293 (for a racial gap of 29). *Id.*

³⁵ The average white thirteen-year-old student scored 266, while the average seventeen-year-old black student scored 264. *Id.*

³⁶ NAT'L CTR. FOR EDUC. STATISTICS, THE NATION'S REPORT CARD, NAEP 1999 LONG-TERM TREND MATHEMATICS SUMMARY DATA TABLES FOR AGE 9 STUDENT DATA, *available at* <http://nces.ed.gov/nationsreportcard/tables/Ltr1999/NTM11011.asp>; NAT'L CTR. FOR EDUC. STATISTICS, THE NATION'S REPORT CARD, NAEP 1999 LONG-TERM TREND MATHEMATICS SUMMARY DATA TABLES FOR AGE 13 STUDENT DATA, *available at* <http://nces.ed.gov/nationsreportcard/tables/Ltr1999/NTM21011.asp>; NAT'L CTR. FOR EDUC. STATISTICS, THE NATION'S REPORT CARD, NAEP 1999 LONG-TERM TREND MATHEMATICS SUMMARY DATA TABLES FOR AGE 17 STUDENT DATA, *available at* <http://nces.ed.gov/nationsreportcard/tables/Ltr1999/NTM31011.asp>.

³⁷ NAT'L CTR. FOR EDUC. STATISTICS, TRENDS IN AVERAGE MATHEMATICS SCALE SCORES BY RACE/ETHNICITY: WHITE-BLACK GAP, *available at* <http://nces.ed.gov/nationsreportcard/ltr/results2004/sub-math-race.asp>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ NAT'L CTR. FOR EDUC. STATISTICS, TRENDS IN AVERAGE READING SCALE SCORES BY RACE/ETHNICITY: WHITE-HISPANIC GAP, *available at* http://nces.ed.gov/nationsreportcard/ltr/results2004/sub_reading_race2.asp.

student.⁴¹ A similar trend can be noted for math scores. The gap between Hispanic nine-year-olds closed to 18 points, the lowest on record.⁴² The gap for thirteen-year-olds closed by one point over the past five years to 23 points, but the gap for seventeen-year-olds increased by two points over the past five years to 24 points.⁴³ Thus, the average Hispanic seventeen-year-old barely scores higher (by 1 point) on the NAEP math test than the average white thirteen-year-old.

The No Child Left Behind Act (NCLB) has also provided state-by-state data on the existence of racial/ethnic test score gaps in every state in the nation. NCLB requires all states to implement statewide accountability mechanisms at both school and district levels.⁴⁴ States must develop challenging academic content and student achievement standards.⁴⁵ The standards are to be uniform throughout the state and should apply to all public schools and students.⁴⁶

Under the Elementary and Secondary Education Act ("ESEA"), as amended by NCLB, the Secretary of Education must submit a report to Congress which provides state-level data for each state receiving assistance under Title I of ESEA.⁴⁷ The first report submitted by the Secretary to Congress this year reported data for the 2002–2003 school year. Appendix A of the Report provides data about the percentage of students considered proficient in math and reading for various grades from each of the fifty states.⁴⁸ This data also separately provides the percentage of students who are considered proficient in reading and math for various subgroups including blacks, Native Americans, Hispanics, Asians and whites.⁴⁹ Even a quick perusal of this data reveals the existence of the racial/ethnic achievement gaps that exist in the country.

B. High School Graduation Rates

Another factor to consider in assessing academic performance of black and Latino students in public schools is high school graduation rates. According to the Census Bureau, in 2002 14.6% of blacks and 30.1% of Hispanics between

⁴¹ *Id.*

⁴² NAT'L CTR. FOR EDUC. STATISTICS, TRENDS IN AVERAGE MATHEMATICS SCALE SCORES BY RACE/ETHNICITY: WHITE-HISPANIC GAP, *available at* http://nces.ed.gov/nationsreportcard/ltr/results2004/sub_math_race2.asp.

⁴³ *Id.*

⁴⁴ See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965).

⁴⁸ DEP'T OF EDUC., NO CHILD LEFT BEHIND ANNUAL REPORT TO CONGRESS, app. A (2005), *available at* <http://www.ed.gov/about/reports/annual/nclbrpts.html>.

⁴⁹ *Id.*

the ages of eighteen and twenty-four had not completed nor were enrolled in high school, compared to 12.2% of non-Hispanic whites.⁵⁰ However, official reports of dropout rates and high school graduation rates may significantly understate the problem. First, these statistics do not count as drop outs individuals who do not finish high school, but who later complete their GED.⁵¹ Second, “[g]raduation rates based on reported enrollment suggest strongly that there are large numbers of ‘missing’ students that go completely unaccounted for in either official dropout or graduation rate reports.”⁵² A recent report on high school graduation rates released by the Civil Rights Project at Harvard University, the Urban Institute, Advocates for Children of New York, and the Civil Society Institute, determined graduation rates by developing a more accurate measure called the Cumulative Promotion Index (CPI).⁵³ Each school district provides its actual enrollment data to the nation’s Common Core of Data. The CPI uses this actual enrollment data to develop a more accurate measure of high school graduation rates. The CPI “examines changes in enrollment and the likelihood of graduating with a high school diploma by combining the average success of groups of students moving from ninth grade to tenth grade, from tenth grade to junior year, from junior to senior year, and from senior year to graduation.”⁵⁴ According to the report “only 68% of those who enter 9th grade graduat[e] with a regular diploma in 12th grade,” but there are vast differences between various racial/ethnic groups.⁵⁵ The graduation rate for non-Hispanic whites is 74.9% and the rate for Asian/Pacific Islanders is 76.8%.⁵⁶ In contrast, the graduation rates for blacks, Native Americans and Latinos are 50.2%, 51.1% and 53.2%, respectively.⁵⁷

⁵⁰ U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–2005: THE NATIONAL DATA BOOK 165, tbl. 254 (2005), available at <http://www.census.gov/prod/2004pubs/04statab/educ.pdf>.

⁵¹ GARY ORFIELD, DANIEL LOSEN, JOHANNA WALD & CHRISTOPHER B. SWANSON, LOSING OUR FUTURE: HOW MINORITY YOUTHS ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 7 (2004), available at http://urbaninstitute.org/UploadedPDF/410936_LosingOurFuture.pdf.

⁵² *Id.* For an extended discussion of the inaccuracies and misleading estimates of high school graduates and school dropouts see *id.* at 7–14.

⁵³ The Cumulative Promotion Index bases graduation rates “on the actual enrollment data that each district provides annually to the nation’s Common Core of Data.” *Id.* at 9. For a full discussion, see *id.* at 9–10.

⁵⁴ *Id.* at 9.

⁵⁵ *Id.* at 2.

⁵⁶ *Id.* at 2.

⁵⁷ ORFIELD, LOSEN, WALD & SWANSON, *supra* note 51, at 2.

C. Grade Retention

Students are retained in a grade if it is believed that they do not have the academic and/or social skills necessary to advance to the next grade level. Retention in a grade is the single most reliable predictor of a student eventually dropping out of school.⁵⁸ Black students are more likely to be retained in one grade during their educational career than any other racial/ethnic group, with the exception of Native Americans.⁵⁹ In 1999, 18% of black and 13% of Hispanic school students had been retained at least one time between kindergarten and twelfth grade.⁶⁰ In contrast only 9% of non-Hispanic whites suffered such academic condemnation.⁶¹

D. Tracking or Achievement Skills Grouping

Tracking or achievement skills groupings have been a major source of racial/ethnic inequality in educational opportunities since the 1960s.⁶² Figures from 1998 reveal that non-Hispanic white high school graduates were almost 50% more likely to have been in the highest academic placement in math in comparison to black high school graduates (45.1% to 30.4%) and 70% more likely than Hispanic graduates (45.1% to 26.2%).⁶³ Blacks were 50% more likely (11.9% to 7.8%) and Hispanics were 75% more likely (13.8% to 7.8%) than non-Hispanic whites to be in the two lowest math tracks.⁶⁴ Black and Hispanic high school graduates were also less likely to be in advanced academic placements in English and science courses.⁶⁵ Black high school graduates were also 50% more likely (17.6% compared to 11.6%) and Hispanic graduates almost twice as likely (22.2% compared to 11.6%) as their non-Hispanic white

⁵⁸ See Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. CR.-C.L. L. REV. 407, 421 (2001).

⁵⁹ NAT'L CTR. FOR EDUC. STATISTICS, DEP'T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF BLACKS 38-39 (2003), available at <http://nces.ed.gov/pubs2003/2003034.pdf>.

⁶⁰ *Id.* at 39.

⁶¹ *Id.*

⁶² See JEANNIE OAKES, *KEEPING TRACK* 65-67 (1985); see also KEVIN WELNER, *LEGAL RIGHTS, LOCAL WRONGS: WHEN COMMUNITY CONTROL COLLIDES WITH EDUCATIONAL EQUITY* 4-5 (2001) (the author studied tracking in four school districts—San Jose, California; Wilmington, Delaware; Woodland Hills, Pennsylvania; and Rockford, Illinois—and found a clear pattern of discrimination. It is also worth noting that all four districts were operating under court-ordered desegregation plans at the time.).

⁶³ See NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 59, at 57.

⁶⁴ See *id.*

⁶⁵ See *id.* at 57-59.

counterparts to be in the least challenging English course.⁶⁶ Approximately 64% of non-Hispanic white high school graduating students took at least one chemistry or physics course in high school, with 33.8% having taken at least two advanced science courses.⁶⁷ In contrast, only 55.2% of blacks and 48.8% of Hispanics took at least one physics or chemistry course, with only 22.3% of students from both groups taking at least two advanced science courses.⁶⁸ Because these statistics are limited to high school graduates, however, they probably understate the racial gaps that exist in achievement skills groupings. These statistics do not adjust for the fact that blacks and Latinos have higher high school dropout rates than non-Hispanic whites do.

In terms of disability, black school children are underrepresented in the group of students with physical disability, but overrepresented in special education placements due to a mental disability. Black students constitute only 17% of public school children, but they represent 21% of those enrolled in special education and 25.1% of those classified as having emotional and behavioral disorders.⁶⁹ Black school children are three times as likely as non-Hispanic white students to be labeled mentally retarded and in five states the disparity is four times.⁷⁰ Almost 15% of black students and 11.3% of Hispanic students, compared to only 10.9% of non-Hispanic white students between the ages of three and twenty-one were served under the Individuals with Disabilities Education Act during the 1999–2000 school year.⁷¹

E. Underrepresentation of Minority Teachers

There is a body of research that establishes a link between a teacher's verbal ability, as measured by standardized tests, and their students' achievement on standardized tests.⁷² Scholars, however, have also identified several important reasons why students of color stay in school longer and achieve more when they

⁶⁶ See *id.* at 59.

⁶⁷ See *id.* at 57. Advanced science courses were chemistry, physics, and advanced biology.

⁶⁸ *Id.*

⁶⁹ See David Osher et al., *Exploring the Relationships Between Inappropriate and Ineffective Special Education Services for African American Children and Youth and their Overrepresentation in the Juvenile Justice System 1*, in MINORITY ISSUES IN SPECIAL EDUCATION (1987); see, e.g., DAN FRENCH & SHELDON ROTHMAN, MASS. BD. OF EDUC., STRUCTURING SCHOOLS FOR STUDENT SUCCESS: A FOCUS ON ABILITY GROUPING 7 (1990) (stating that minority students are overrepresented in the lowest ability tracks).

⁷⁰ Losen & Welner, *supra* note 58, at 412.

⁷¹ See NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 59, at 143.

⁷² See EDUCATIONAL TESTING SERVICE, THE ACADEMIC QUALITY OF PROSPECTIVE TEACHERS: THE IMPACT OF ADMISSIONS AND LICENSURE TESTING 13 (1999), available at <http://ftp.ets.org/pub/res/researcher/RR-03-35.pdf>.

have teachers that look like themselves.⁷³ Teachers of color provide students of color with invaluable role models. This is especially true in education, where they function as examples of academic success in an area where blacks and Latinos are often not expected to succeed.⁷⁴ Black and Latino teachers also share their students' cultural and life experiences. Thus, they may be better able to respond to the particular difficulties that these students face both in public school and in American society in general. Black and Latino teachers may be able to reach out and work successfully with parents of students of color who are more likely to trust their judgment and evaluation of their children.⁷⁵ It may also be that teachers of color will hold higher expectations for students of color. Many studies have demonstrated that teacher expectations have a significant impact on how well students learn.⁷⁶

III. CHANGE IN THE BACKGROUND ASSUMPTIONS FOR INTERPRETING THE EQUAL PROTECTION RIGHTS OF SCHOOL CHILDREN

Between 1938 and 1950 the Supreme Court handed down four decisions striking down various aspects of segregation in graduate and professional schools. In granting the black plaintiffs relief in those cases, the Supreme Court did not have to overturn the doctrine of "separate but equal" announced in *Plessy v. Ferguson*.⁷⁷ As a result, the Court did not need to consider whether segregation per se had a negative impact on blacks or on the educational process of black educational institutions. The notion of "separate" in the graduate and professional school context provided by the southern states did not approach measurable equality.

When Earl Warren issued his opinion for the unanimous Supreme Court in

⁷³ REBECCA GORDON ET AL., *FACING THE CONSEQUENCES: AN EXAMINATION OF RACIAL DISCRIMINATION IN U.S. PUBLIC SCHOOLS* 20 (2000). Teachers of color also provide important benefits for white children as well. *Id.*

⁷⁴ See Joseph Stewart et al., *In Quest of Role Models: Change in Black Teacher Representation in Urban School Districts, 1968–1986*, 58 J. NEGRO EDUC. 140, 140–41 (1989).

⁷⁵ See generally John U. Ogbu, *Immigrant and Involuntary Minorities in Comparative Perspective*, in *MINORITY STATUS AND SCHOOLING: A COMPARATIVE STUDY OF IMMIGRANT AND INVOLUNTARY MINORITIES* 13–17 (Margaret A. Gibson & John U. Ogbu eds., 1991) (discussing the general distrust that involuntary minorities have about public education).

⁷⁶ See, e.g., Robert T. Tauber, *Good or Bad, What Teachers Expect from Students They Generally Get!*, ERIC DIGEST 1, 1–2, available at <http://eric.ed.gov> (search article title and author in "Advanced Search" option); Lee Jussim & Jacquelynne S. Eccles, *Teacher Expectations II: Construction and Reflection of Student Achievement*, 63 J. PERSONALITY & SOC. PSYCHOL. 947, 947 (1992); Thomas L. Good, *Two Decades of Research on Teacher Expectations: Findings and Future Directions*, 38 J. TEACHER EDUC. 32, 32 (1987).

⁷⁷ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Brown v. Board of Education (Brown I), he assumed that the physical facilities and other tangible factors of the public schools attended by black and white students were equal.⁷⁸ Given the objectively measurable equality of segregation in this context, the Court was forced to identify another harm resulting from segregation. In one of the most quoted phrases from *Brown I*, the Court stated: “[t]o separate [black youths] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁷⁹ The Court went on to quote approvingly from the district court in Kansas:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.⁸⁰

In a significant way, Warren’s opinion was consistent with a long line of Supreme Court cases interpreting the rights of blacks based upon the built-in assumptions that in some way they were less than the relevant norm. What stands out in reading the justifications of the Court for striking down segregation with the cold reflection that occurs fifty years removed from the opinion is the reality that the Court did not reject the fundamental belief in the inferiority of black people. Segregation in public schools was struck down not because of, but in spite of, the fact that blacks were not the equal to whites.⁸¹ The Supreme Court’s explanation of the harm that segregation inflicted was based upon the same basic belief about the second rate abilities of blacks that at earlier times justified slavery (“[blacks were] regarded as beings . . . so far inferior, that they had no rights which the white man was bound to respect”⁸²) and separate but equal (“[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane”⁸³). What made *Brown I* such an historic break from the dominant racial attitudes about black school children up until that time was not its acceptance of blacks as

⁷⁸ *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

⁷⁹ *Id.*

⁸⁰ *Id.* at 494 (quoting *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951)).

⁸¹ E.g., Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 52–67 (1992).

⁸² *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

⁸³ *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

equal to whites, but that the Court attributed black inferiority to differences in the respective social environments of blacks and whites, as opposed to ontological distinctions. When situated in an historical context, *Brown I* was a very sanguine opinion because it suggested that there was a cure for—or at least a way to improve—black people. Blacks could be made better by enriching their social environment, particularly the educational environment of the young. Born out of this belief was a view of the Equal Protection Clause based upon a special concern for the educational interest of black school children. If their educational environment could be ameliorated, they could be improved as a people.

The Supreme Court never abandoned the view of the harm of segregation articulated in *Brown I*. For example, it was not until fourteen years after *Brown I*—in *Green v. New Kent County*⁸⁴—that the Supreme Court placed upon school boards an affirmative obligation to mix the races in public schools in order to remedy the harm derived from operating a dual school system. The Court's explanation for the duty to desegregate public schools was simply that the constitutional rights of African American school children recognized in *Brown I* and *Brown II*⁸⁵ required it.

Twenty-three years after *Brown I*, the Supreme Court approved educational remedies to combat the effects of the operation of de jure segregated schools in *Milliken v. Bradley (Milliken II)*.⁸⁶ In explaining its approval of the *Milliken II* educational remedies, the Court once again focused on the presumed negative impact of de jure segregation only on black children.⁸⁷ In reference to the black school children who would continue to attend segregated schools, the Court stated that “[c]hildren who have been . . . educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation . . . Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger . . .”⁸⁸ While the Court goes on to note that the problems of black children were not peculiar to the black race, the Court's reasoning clearly implied that distortions in the speech, conduct, and attitudes of black children were the result of racial isolation.⁸⁹ Thus, consistent with its rationale for striking down segregation statutes in *Brown I*, the Court's reasoning in *Milliken II* also rested upon the belief that racial isolation alone psychologically and intellectually damaged black children.

In 1992, the Supreme Court delivered its second school desegregation

⁸⁴ *Green v. New Kent County*, 391 U.S. 430 (1968).

⁸⁵ *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

⁸⁶ *Milliken v. Bradley*, 433 U.S. 267, 279 (1977).

⁸⁷ *Id.* at 287–88.

⁸⁸ *Id.* at 287.

⁸⁹ *Id.*

termination opinion, *Freeman v. Pitts*.⁹⁰ The opinion, written by Justice Kennedy, addressed a situation in which a school system under federal court supervision had not eradicated the vestiges of its prior de jure conduct in all aspects of the system, but arguably had done so in some aspects.⁹¹ In this opinion, the Court agreed that active federal court supervision could be terminated over the portion of the school system in which the vestiges of the prior de jure conduct were eliminated, with supervision remaining over the other aspects.⁹²

When discussing the harm that school desegregation remedies were targeted to rectify, Kennedy quoted the passages noted above from *Brown I*.⁹³ Thus, the Supreme Court always asserted that the primary justification for remedies for de jure segregation was the psychological damage inflicted by segregation upon blacks.⁹⁴

Beginning with its 1973 decision in *Keyes v. School District No. 1*,⁹⁵ the Court began to back away from the interpretation of the Equal Protection Clause as embodying a special concern about improving the educational environment of black school children. After 1973, the Court increasingly embraced the notion that the equal protection rights of black school children should be based upon a concept of treating all public school children as individuals.⁹⁶ The effect of this change in viewing segregation against the background of individual rights, as opposed to a special concern about improving the educational

⁹⁰ *Freeman v. Pitts*, 503 U.S. 467 (1992).

⁹¹ *Id.* at 471.

⁹² *Id.* at 471.

⁹³ *Id.* at 485–86.

⁹⁴ Justice Clarence Thomas noted in his concurring opinion in *Missouri v. Jenkins*, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring) that the Court's opinion in *Brown I* has been misread. According to Thomas:

Brown I . . . did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race. . . . Segregation was not unconstitutional because it might have caused psychological feelings of inferiority. . . . Psychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause.

Id. Justice Kennedy, in the Court's 1995 redistricting opinion in *Miller v. Johnson*, 515 U.S. 900, 911(1995), intimated that the problem with segregation struck down by the Court in *Brown I* was that government should treat people as individuals, not as members of racial or ethnic groups. Since segregation required government to treat both white and black students as members of racial groups, segregation could be viewed as violating the equal protection rights of both white and black school children. *Id.*

⁹⁵ *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

⁹⁶ See *BROWN*, *supra* note 4, at 207–24.

environment of black school children, produced three developments in the interpretation of the Equal Protection Clause that inevitably led to the resegregation of America's public schools noted above. First, with the Supreme Court's decision in *Keyes*, the Court began to back away from its commitment to aggressively pursue integration of public schools.⁹⁷ The second development was the issuing of opinions by the Supreme Court in the 1990s that set the framework for the termination of school desegregation decrees.⁹⁸ Once the effects of the prior *de jure* conduct had been eradicated, the existing school desegregation decree was terminated.⁹⁹ School officials were free to adopt new student assignment policies that were no longer motivated by a desire to achieve the greatest possible degree of actual desegregation¹⁰⁰ so long as they were not motivated by discriminatory intent.¹⁰¹ Thus, new student assignment plans could not help but significantly increase racial segregation. Finally, by the mid-1990s lower federal courts were addressing challenges to the use of racial classifications to promote integrated education when their use could not be constitutionally justified by the need to remedy the prior operation of a dual school system.¹⁰² These lower federal courts took their lead from the Supreme Court's statement in *Adarand Constructors, Inc. v. Peña* that "all racial classifications, imposed by whatever federal, state, or local governmental actor,

⁹⁷ See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434–35 (1976).

⁹⁸ See *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991); *Freeman v. Pitts*, 503 U.S. 467, 467 (1992); *Jenkins*, 515 U.S. at 102.

⁹⁹ See *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248 (1991).

¹⁰⁰ See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31–32 (1971).

¹⁰¹ *Dowell*, 498 U.S. at 250.

¹⁰² See, e.g., *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 131–32 (4th Cir. 1999); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 706 (4th Cir. 1999); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246, 250–51 (5th Cir. 2005). *But see* *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000) (upholding a voluntary school integration plan); *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1067 (9th Cir. 1999) (upholding a voluntary school integration plan on very narrow grounds). Since the summer of 2005, three different federal circuits have addressed the use of racial classifications as a means to promote voluntary integration. These courts all upheld the plans presented. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005) (en banc); *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005) (en banc), *cert. denied*, 126 S.Ct. 798 (2005); *McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834, 851 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005). These cases could signal a trend toward more deference to school districts using racial classifications to promote voluntary integration. Even if this trend continues, the other two developments—the Supreme Court backing away from its commitment to aggressively pursuing desegregation and the termination of school desegregation decrees—suggests that racial/ethnic resegregation is likely to continue.

must be analyzed by a reviewing court under strict scrutiny."¹⁰³ As a result, lower federal courts have analyzed the constitutionality of using racial classifications as a means to promote voluntary integration by examining whether they were justified by a compelling state interest and whether the means used to advance that interest were narrowly tailored. Many of these lower court decisions concluded that the state or local school officials' desegregation plans failed to meet strict scrutiny. Most of these lower federal courts agreed that the school officials could assert the diversity interest recognized by Justice Powell in his opinion in the *Regents of the University of California v. Bakke*¹⁰⁴ and subsequently adopted by a majority of the members of the Court in *Grutter v. Bollinger*,¹⁰⁵ but they concluded that the plans adopted were not narrowly tailored to advance the diversity interest.¹⁰⁶ These lower federal courts drew a distinction between individual diversity and racial and ethnic balancing. They concluded that the desegregation plans adopted by the school authorities engaged in racial balancing which was not narrowly tailored to the compelling state interest of educational diversity.

The above three developments all reflect a shift in the background assumptions upon which the equal protection rights of black school children are interpreted.¹⁰⁷ Thus, the effect of the change from viewing the Equal Protection Clause with a special concern for improving the educational environment of black school children, to viewing it in terms of protecting the rights of individuals, has meant that public schools for the past fifteen years have been resegregating.¹⁰⁸ What is more important, however, is that this resegregation is likely to continue for the foreseeable future.

Outside the area of school assignments, the shift in the basic view of the equal protection rights of black school children has had two other significant consequences. First, unconstitutional discrimination is defined as racially-motivated decision making which fails to treat a person as an individual, not negative disparate effects on blacks or other racially- or ethnically-disadvantaged school children generated by various educational policies and practices. But because educational policies and practices can almost always be justified based on legitimate educational concerns, it is difficult to prove that they were primarily motivated by discriminatory intent.¹⁰⁹ Thus, the continued

¹⁰³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

¹⁰⁴ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (Powell, J., announcing the judgment of the Court and concurring).

¹⁰⁵ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁰⁶ See, e.g., *Eisenberg*, 197 F.3d at 131; *Tuttle*, 195 F.3d at 705; *Wessmann*, 160 F.3d at 807; *Cavalier*, 403 F.3d at 249.

¹⁰⁷ For an in-depth discussion, see BROWN, *supra* note 4, at 273-96.

¹⁰⁸ See *supra* note 6.

¹⁰⁹ See *supra* note 15.

gaps in academic achievement between black and Latino school children and their non-Hispanic white counterparts derived from race-neutral educational policies and practices are generally viewed, for equal protection purposes, as unfortunate byproducts of race-neutral education decisions that do not raise equal protection concerns.

Second, this shift severely limits the programs and policies that public school authorities can implement to attack racial/ethnic achievement gaps in educational performance.¹¹⁰ Educational strategies that employ racial and ethnic classifications must survive strict scrutiny.¹¹¹ Though strict scrutiny is no longer viewed as “strict in appearance but fatal in fact,” outside of the need to remedy an existing equal protection violation or obtain the benefits derived from diversity in education, the use of racial classifications will seldom survive an equal protection challenge.¹¹² Thus, legislators and educators interested in reducing the racial/ethnic achievement gaps are increasingly forced to advocate for the adoption of race-neutral educational policies and practices.

IV. INCREASING SCHOOL CHOICE AS A WAY TO REDUCE THE RACIAL/ETHNIC ACHIEVEMENT GAPS

Given the continuing racial and ethnic achievement gaps, the resegregation of public schools, and the limitations on the use of racial classifications in forming educational policies and programs, politicians and educational strategists desiring to improve the performance of black and Latino school children are increasingly compelled to argue for race-neutral policies and programs. It is these realities that have contributed to the expansion of school choice as an important educational reform.

By choosing where to reside, parents exercise a tremendous amount of

¹¹⁰ See, e.g., *Wygant v. Jackson Bd. of Educ.*, 467 U.S. 267 (1986) (concluding that the need for minority children to have role models was not a compelling state interest for the use of racial classifications to prevent the laying off of minority public school teachers); *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991) (striking down public black male academics for a number of reasons, including violation of the Equal Protection Clause’s prohibition against gender discrimination); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (striking down use of racial classifications in order to increase the number of blacks and Latinos at Boston’s most prestigious academic schools).

¹¹¹ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny.”).

¹¹² But see *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162 (9th Cir. 2005) (en banc) (holding that obtaining the benefits of racial balancing is a compelling state interest); *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005) (en banc), *cert. denied*, 126 S.Ct. 798 (2005) (holding that obtaining the benefits of racial balancing is a compelling state interest).

choice over which school their child attends. One of the typical major considerations in choosing where to live is the quality of the available schools. Families with financial means are able to leave one school district by moving to another district. Due to this mobility, maintaining excellent schools is central to most affluent communities' appeal to those who can afford to live in such communities. It is also central to moderate-income communities' strategies to attract new taxpaying residents. In districts in which people have the means to choose whether to leave or stay (i.e., the more affluent districts), the schools are predictably among the best. Thus, in terms of residential choice, the affluent parents of school children reap tremendous educational benefits for their children that come from these parents' considerable capacity to choose the school that their children attend. As Professors James Ryan and Michael Heise pointed out, "[s]uburban parents are generally satisfied with the public schools their children attend" and thus are not supportive of school choice.¹¹³

Under increased choice proposals, all parents in a given school district, given schools, a given area in a given school district, or below a particular income level, are provided with an increased opportunity to choose the school that their child attends. Since increased parental choice is based upon a qualification other than the race or ethnicity of the child, strict scrutiny should not apply.¹¹⁴ Increased choice can be done primarily through the expansion of public school choice—including through the creation and establishment of charter schools—or through increasing public funding for private education. There are significant differences between public school choice and public funding of private education.¹¹⁵ But both are born out of the same concerns.

¹¹³ James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2045 (2002).

¹¹⁴ See, e.g., *Anderson v. City of Boston*, 375 F.3d 71 (1st Cir. 2004).

¹¹⁵ An advantage of public funding of private education over charter schools is that privatizing a significant portion of public education could afford educators more flexibility in designing their academic programs. Experimentation and flexibility of charter schools are limited by constitutional rights. Vouchers would allow for more experimentation, because constitutional restrictions do not apply to private schools. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (holding that a private school whose income is derived primarily from public sources and that is regulated by public authorities was, nevertheless, not a state actor subject to constitutional limitations). Thus, limitations imposed on public education by the Free Speech Clause, the Establishment Clause, the Equal Protection Clause, and the Fourth Amendment, would not limit educational policies and procedures. See, e.g., *Tinker v. Des Moines*, 393 U.S. 503 (1968) (holding that students in public schools still maintain rights of the Free Speech Clause under the First Amendment); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down an Alabama statute authorizing a one-minute period of silence for meditation or voluntary prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (striking down a statute providing for the posting of the Ten Commandments, paid for by private funds, on the walls of public school classrooms in Kentucky); *Garrett*, 775 F. Supp. 1004 (striking down effort by the Detroit School Board to create black male academics); *New Jersey v.*

Because low-income parents of minority school children in urban areas have the least capability to choose good schools for their children, either through making residential choices or paying for private education, the increase in choice should disproportionately advantage these parents and their children. Thus, increasing the ability of parents to choose the school that their children attend beyond residential choice is a race-neutral means of educational reform that is more likely to help low-income, urban, minority students and parents.

A. Public School Choice in the Form of Charter Schools

Beyond residential choices, the concept of school choice is a varied one. It can be defined broadly as educational policies and practices that allow a student to attend a school other than his or her neighborhood school. With this definition there are a number of methods to increase choice within the public school system. There are some public school districts that participate in interdistrict school choice programs.¹¹⁶ These choice programs tend to be expensive because transportation must be provided. In addition, suburban school districts tend to resist taking students from urban school districts for fear that these students would significantly disrupt their educational system without a corresponding educational value for the suburban school students. Suburbanites also want to protect both their financial resources and the safety of their children. Interdistrict choice might adversely affect property values in suburban neighborhoods and bring into their neighborhoods what these residents consider to be “undesirable” individuals. Thus, interdistrict choice programs tend to be limited in number and in scope.

Since the late 1960s, most school choice options have largely been the result of a desire to promote integration. Intra-district public choice often began as part of the remedy for actions by school officials that led to segregated school systems. Many school desegregation plans encouraged students to seek voluntary transfers that would improve the racial and ethnic mix of the sending and receiving schools. Magnet schools are another type of well known and popular intradistrict school choice program. Magnet programs target specific schools and spend significant amounts of money upgrading the physical quality of the school, as well as its curricular offerings. Magnet schools usually concentrate their academic focus on a given subject area. The educational programs in magnet schools ordinarily focus on foreign languages, reading, science, math, or the arts. In order to promote integration, racial and ethnic

T.L.O., 469 U.S. 325 (1985) (rejecting in loco parentis doctrine and agreeing that Fourth Amendment’s proscription against unreasonable search and seizure applies to public school authorities).

¹¹⁶ See Angela Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*, 74 NEBRASKA L. REV. 255, 281 (1995).

classifications are normally used to determine the appropriate mix of the student body. The 1736 magnet schools in the country enrolled some 3.0% of American students in 2001.¹¹⁷ But school choice options, including magnet schools, initiated for the purpose of promoting integrated schools are being scaled back due to equal protection concerns related to the use of racial classifications in admissions decisions.¹¹⁸ As school districts terminate their school desegregation decrees, they are also eliminating the compelling justification that allows them to employ racial classifications in order to achieve an appropriate racial and ethnic mix in these schools. As a result, school choice motivated by a desire to promote integrated public education is increasingly seen as constitutionally suspect.

Charter schools are another type of intradistrict choice option.¹¹⁹ Charter schools differ from magnet schools in that they focus on educational reform and not integration.¹²⁰ Minnesota was the first state in the nation to pass charter school legislation in 1991. The number of charter schools grew from the original two in Minnesota in 1991 to almost 3000 in 2004 operating in 37 states plus the District of Columbia and Puerto Rico.¹²¹ Collectively, these schools enroll approximately 750,000 students. However, "more than one-third of those schools had been in operation for three years or less, while more than 400 other charter schools had gone out of business between 1991 and 2004."¹²²

Charter school legislation varies from state to state,¹²³ but it allows for

¹¹⁷ ERICA FRANKENBERG & CHUNGMEI LEE, *CHARTER SCHOOLS AND RACE: A LOST OPPORTUNITY FOR INTEGRATED EDUCATION* 12 (2002).

¹¹⁸ See, e.g., *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998).

¹¹⁹ For a brief basic primer about charter schools, see Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 574–77 (2001).

¹²⁰ Robin D. Barnes, *Group Conflict and the Constitution: Race, Sexuality, and Religion: Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2404 (1997).

¹²¹ National Education Association, *Charter Schools*, available at <http://www.nea.org/charter/index.html> (last visited Jan. 23, 2006).

¹²² *Id.*

¹²³ A charter school movement pioneer has offered "nine essentials" that make up the core underlying what a charter school is:

(1) [T]he school may be organized, owned, and run by any of several parties; (2) the organizers may approach more than one public body for their charter; (3) the school is a legal entity; (4) the school is public and may not charge tuition, discriminate or engage in selective admissions, must follow health and safety laws, and is not affiliated with a religious group; (5) the school is accountable for the students' academic performance and the school loses its charter if it fails to achieve its goals; (6) the school gets real freedom to change instructional and management practices; (7) the school is a school of choice: no student is required to attend; (8) the state transfers a fair share of school funding from each student's home district to the charter school; and (9) the schools' teachers are protected and given the opportunity to participate in the design of schools.

private persons and institutions, including so-called educational management companies like the Nobel Learning Communities, Inc.,¹²⁴ to develop and implement plans for a given school. Charter schools are considered public schools.¹²⁵ They are, however, under less supervisory control by public educational officials and can often operate somewhat independently of public school authorities. Charter schools are intended to foster new approaches to education with innovative curricula and instruction. The unique focus of charter schools forms the primary means of attracting parents and children to the schools.¹²⁶

Most charter schools are concentrated in urban areas.¹²⁷ While charter schools are not allowed to discriminate on the basis of race or ethnicity in their admissions criteria, enrollment numbers suggest that charter schools tend to be more segregated than normal public schools. One survey showed that over 43% of charter schools report that over 60% of their students are minorities.¹²⁸ A survey of 1010 charter schools started in 1998–1999 and still open a year later showed that 27.3% of the students were black, with another 20.8% being Latino (this contrasts with 16.9% and 14.9% of students in traditional public schools being black or Latino, respectively).¹²⁹

Charter schools can provide minority parents with the opportunity to become more involved in the design of their children's educational programs. Charter schools encourage experimentation and the adoption of alternative educational programs, which can be structured to address the different sociocultural environments of black and Latino youth.¹³⁰ Plus, charter schools vest ultimate authority for the educational choice in the hands of the parents. If a child in a charter school is not learning, his or her parents can send him or her to

Gerard Toussaint Robinson, *Can the Spirit of Brown Survive in the Era of School Choice? A Legal and Policy Perspective*, 45 How. L.J. 281, 295–96 (2002) (paraphrasing Ted Kolderie).

¹²⁴ William C. Symonds, *Edison: How Big a Blow to School Choice?*, BUS. WK., June 3, 2002, at 44 (detailing how Nobel currently operates 174 schools serving 25,000 students).

¹²⁵ See Parker, *supra* note 119, at 604.

¹²⁶ *Id.* at 611–15.

¹²⁷ FRANKENBERG & LEE, *supra* note 117, at 11.

¹²⁸ THE CTR. FOR EDUC. REFORM, CHARTER SCHOOLS 2002: RESULTS FROM CER'S ANNUAL SURVEY OF AMERICA'S CHARTER SCHOOLS 5 (2002), available at http://edreform.com/_upload/survey2002.pdf.

¹²⁹ U.S. Bureau of the Census, *Statistical Abstract of the United States: 2004–2005: The National Data Book* 159, tbl. 239 (2003), available at <http://www.census.gov/prod/2004pubs/03statab/educ.pdf>.

¹³⁰ For example, Harvest Preparatory School is a charter school in Minneapolis that used an Afrocentric curriculum with an emphasis on basic skills. See Rob Hotakainun, *Minnesota's Charter School Concept Wins Crucial Vote*, STAR TRIB. (MINNEAPOLIS), July 8, 1998, at 1A.

a different school.

B. Public Funding of Private School Choice or School Vouchers

Public funding of private school choice presents another potential race-neutral solution to the educational problems of black and Latino students in urban schools.¹³¹ The Supreme Court's 2002 decision in *Zelman v. Simmons-Harris*¹³² significantly increased the attraction of public funding of private education. In that five-to-four decision, the Court upheld a voucher program operated by Cleveland, Ohio against an Establishment Clause challenge.¹³³ *Zelman* may not be the last word on the issue of public funding of private school choice, but for now it appears that a well-crafted school voucher proposal can survive an Establishment Clause challenge.¹³⁴

While school vouchers are currently a relatively minor aspect of school choice, the 2005 legislative year was a very active one for proponents of public financing of private education.¹³⁵ Pennsylvania and Arizona passed bills in 2005 making it easier for parents to educate their children in private schools with some assistance from taxpayers.¹³⁶ Utah joined the states of Florida and

¹³¹ Contemporary discussions of the issue of school vouchers normally start their historical analysis of this issue with Milton Friedman's, the economic professor and Nobel Laureate, 1955 proposal. Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* (Robert A. Solo ed., 1955). Long range historians note that Adam Smith seems to have been the first social theorist to propose that the government finance education by giving money to parents to hire teachers. See, e.g., THE CENTER FOR THE STUDY OF PUBLIC POLICY, *EDUCATION VOUCHERS: A REPORT ON FINANCING ELEMENTARY EDUCATION BY GRANTS TO PARENTS* vii (1970). For the black community, school vouchers have a history that predates and overshadows Milton Friedman's 1955 proposal. After the Supreme Court rendered its opinion in *Brown I*, resistance to school desegregation, particularly in the deep South, was massive. *Id.* For a recent discussion of the use of public funding of private education to avoid desegregation, see Kevin D. Brown, *Reexamination of the Benefit of Publicly Funded Private Education for African-American Students in a Post-Desegregation Era*, 36 IND. L. REV. 477 (2003).

¹³² *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

¹³³ *Id.* at 662–63.

¹³⁴ See, e.g., Charles Fried, Comment, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 163 (2002); Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1398–99 (2003); John Gehring, *Voucher Battles Head to State Capitals*, EDUC. WK., July 10, 2002, at 1, 24.

¹³⁵ School choice bills passed in seventeen legislative houses and in eleven different states. Ohio and Utah enacted new choice programs. Florida and Ohio both expanded existing choice programs. Arizona increased the amount of tax credit for money donated to a scholarship organization. Alliance for Sch. Choice, 2005: *Best Legislative Year Ever for School Choice*, SCH. CHOICE ACTIVIST, July 2005, at 1, available at http://www.allianceforschoolchoice.org/_files/_sca/SCA_July2005.pdf.

¹³⁶ *Id.*

Ohio as the only three states that offer tuition vouchers for students with special needs.¹³⁷ Utah established the Carson Smith voucher program which provides vouchers worth up to \$5700 which can be used to attend private schools to all Utah students who have an Individual Education Plan (IEP).¹³⁸ Some 54,000 students in Utah, 11% of the total student population, qualify for the vouchers.¹³⁹

The Ohio legislature was also very active this past year. In 2005, the Ohio legislature extended Cleveland's voucher program, which had been available only to K-10 students, to now include 11th- and 12th-grade students.¹⁴⁰ The maximum amount of the vouchers is also set to increase in fiscal year 2007 from \$3000 to \$3450.¹⁴¹ Ohio also made permanent the formerly pilot Autism Scholarship Program, increased the scholarships from \$15,000 to \$20,000 apiece, and removed the cap on the number of autistic children who can enroll.¹⁴² Finally, Ohio created a statewide choice scholarship program to begin in 2006, which is targeted to include students in failing public schools.¹⁴³ The program will provide scholarships ranging from \$4250 for kindergarten to eighth-grade students to \$5000 for students in grades nine through twelve. Students can use the funds to attend public or private schools of their choice.¹⁴⁴ Beginning in fiscal year 2007, up to 14,000 students will be eligible for these scholarships.¹⁴⁵

The State of Florida has three programs that provide funds for students to attend private schools, one of which was substantially expanded this legislative year. The McKay Scholarship provides vouchers for students with disabilities.¹⁴⁶ The amount of the voucher depends upon the disability, but some can be worth more than \$20,000.¹⁴⁷ About 15,500 students are using McKay

¹³⁷ Press Release, Friedman Found., Utah Governor Signs School Voucher Bill: Multi-Year Effort Results in School Choice for Special Needs Students (Mar. 10, 2005) <http://www.friedmanfoundation.org/news/2005-03-10.html>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Press Release, Friedman Found., Ohio Gov. Signs Budget Creating Statewide School Voucher Program (June 30, 2005) <http://www.friedmanfoundation.org/news/2005-06-30.html>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Kate McGreevy, *Ohio Creates One of the Nation's Largest Voucher Programs*, SCHOOL REFORM NEWS, Sept. 1, 2005, at 1, available at <http://www.heartland.org/Article.cfm?artId=17646>.

¹⁴⁶ Carol Hendric, *The Florida Experiment*, EDUC. WK., Jan. 4, 2004, at 60, available at <http://www.edweek.org>.

¹⁴⁷ *Id.*

vouchers to attend private schools.¹⁴⁸ The second program is the Opportunity Scholarship. This scholarship provides vouchers for students in public schools who receive an F grade twice in four years.¹⁴⁹ But this program was struck down by the Florida District Court of Appeals in 2004.¹⁵⁰ In January of 2006, the Florida Supreme Court affirmed the decision.¹⁵¹ The third program is the Corporate Tax Credit Scholarship.¹⁵² Students who are eligible for free or reduced-price lunches qualify for these vouchers worth \$3500 each.¹⁵³ Private companies can donate money to the program and receive a dollar-for-dollar tax credit.¹⁵⁴ The vouchers are awarded through private Scholarship Funding Organizations that collect the donations and issue the vouchers to students.¹⁵⁵ The number of students using tax credit vouchers could increase substantially because the Florida legislature raised the total amount of contributions that corporations can provide from \$50 million to \$88 million.¹⁵⁶

C. *The No Child Left Behind Act*

Title I of the No Child Left Behind Act (NCLB) is named “Improving the Academic Achievement of the Disadvantaged,” and the first words of the Act are, “[a]n Act [t]o close the achievement gap with accountability, flexibility and choice, so that no child is left behind.”¹⁵⁷ Among the NCLB’s purposes is meeting the “educational needs of low-achieving children in [the country’s] highest-poverty schools.”¹⁵⁸ The Act also hopes to close “the achievement gap between high- and low-performing children, especially the achievement gaps between minority and non minority students, and between disadvantaged students and their more advantaged peers.”¹⁵⁹

The core of NCLB is its requirement for adequate yearly progress. The No Child Left Behind Act requires that states, school districts, and individual

¹⁴⁸ *Id.*

¹⁴⁹ See Clint Bolick, *Judicial Clouds in the Sunshine State*, available at http://www.allianceforschoolchoice.org/_files/_sca/SCA_July2005.pdf.

¹⁵⁰ *Bush v. Holmes*, 886 So. 2d 340, 366 (Fla. Dist. Ct. App. 2004).

¹⁵¹ *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006).

¹⁵² Florida Corporate Tax Credit Scholarship Program, available at <http://www.scholarshipfunding.org>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See Alliance for School Choice, *State Reports*, 2 SCHOOL CHOICE ACTIVIST 6 (2005), available at http://www.allianceforschoolchoice.org/_files/_sca/SCA_July2005.pdf.

¹⁵⁷ No Child Left Behind Act of 2001, Pub. L. No. 107-10, pmb., 115 Stat. 1425.

¹⁵⁸ *Id.*

¹⁵⁹ No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1001, 115 Stat. 1425.

schools demonstrate adequate yearly progress toward enabling all public school students to meet the state's academic achievement standards, while working toward the goal of narrowing the achievement gaps in the state. States must first establish a starting point from which improvement can be assessed (i.e. the current percentage of students meeting or exceeding the state's "proficient" level of achievement). Thereafter, the state must identify for each subsequent school year (beginning no later than the 2004–2005 school year), a minimum percentage of students who must meet or exceed the proficient level of academic achievement. To achieve the required adequate yearly progress, the percentage of students meeting the states' minimum proficient level of academic achievement must increase by a predetermined rate. The rate is calculated to achieve the long-term requirement that all students meet or exceed the state's "proficient" level of academic achievement no later than the 2013–2014 school year. Since a major goal of NCLB is to narrow achievement gaps, states, school districts, and schools must separately account for and achieve adequate yearly progress with respect to specific subgroups of students. The following subgroups of students must be accounted for separately: African American/Black; American Indian/Native Alaskan; Hispanic; Asian/Pacific Islander; White; economically disadvantaged; students with disabilities; limited English proficiency; economically disadvantaged; and migrant. For a school to make adequate yearly progress, all subgroups must make progress. Thus, for example, if whites, Asians, and Hispanic students make adequate yearly progress, but black students do not, the school fails to make adequate yearly progress.

If schools fail to make adequate yearly progress under NCLB, sanctions are triggered. Where a school has been cited for its failure to make adequate yearly progress, NCLB mandates that the district provide all students enrolled in the school with the option to transfer to another public school in the district, which has not been so identified. As indicated earlier, even a quick perusal of the data in the first report submitted by the Secretary of Education to Congress starkly reveals the extent of the racial/ethnic achievement gaps that exist in the country. As the years go by it is quite likely that the number of schools failing to make adequate yearly progress will increase. Even though private school vouchers were not included in NCLB, in light of NCLB, public school choice is set to explode.

D. Lack of Consensus Regarding the Ability of Increased Choice to Generate Significant Educational Improvement

Advocates for increased choice generally assert that this process-oriented approach will improve educational achievement in a number of ways. Increased choice requires increasing the number and type of public or private schools. Increased choice also creates a competitive environment that forces schools to

compete for students. Thus, increased school choice has the potential to produce new and innovative schools, including those that are particularly effective at responding to the educational needs of minority, low-income, urban school students. In a Darwinian competitive environment, schools that cannot demonstrate their ability to provide a good education will not survive. Increased choice also reduces administrative burdens on educators. Educational decisions are driven increasingly down to the level of the individual school. This should allow educators to respond more effectively to the educational needs of students enrolled in their schools. Allowing parents to select the school that their children attend should increase parental and student satisfaction with students' education. Choice provides the opportunity for the parents who do not think a particular school is serving their child's interest to select another school.

Despite the arguments of advocates for increased choice, it is too early to determine whether increased choice in the form of charter schools and school vouchers will lead to significant improvement in academic achievement in minorities.¹⁶⁰ In order for diverse educational opportunities and a competitive atmosphere to develop, a sufficient market for school choice must first be generated. Furthermore, the effects of increased choice may not be noticeable for a number of years after competitive market forces are in place. The charter school movement is less than fifteen years old, and considerably younger in many states. Although private schools have existed since the foundation of this country, one cannot easily compare the academic performance of private school students with public school students. Various aspects of selection-bias inherent in school choice always makes academic comparisons difficult. Even if differences in income, parental education, neighborhood, hours spent studying, and other relevant factors could be controlled, selection-bias would make comparisons between the academic performances of students in schools of choice as opposed to traditional public schools difficult. Students whose parents select charter schools or private schools may be different from students whose parents do not. Families who are informed enough to select schools that their children will attend have made special efforts that evince their concern about their children's education and, more importantly, the wherewithal to advance that concern.

Second, many private schools and charter schools generally lack the expertise to serve English-as-a-Second-Language students or severely disadvantaged students, including special education students. These students tend to score lowest on standardized tests; thus their elimination from the student body alone would improve test scores of private and charter schools

¹⁶⁰ See, e.g., Jeffrey R. Henig, *School Choice Outcomes*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 89-101 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999)(noting the difficulties with ability of empirical data to answer the question about educational achievement resulting from increased choice).

over those of traditional public schools. A third form of selection-bias is that charter school or private school operators are likely to try to recruit the type of students that should do well in their educational programs. Thus, even if admissions are open to all, there are still likely to be biases in determining which students are recruited to attend the charter or private schools. The existence of these various aspects of selection-bias makes it difficult to draw general conclusions as to whether the better academic performance of students in charter or private schools is the result of the competitive environment created for the schools or the result of selection-bias in choosing the students who attend.

V. CONCLUSION

America has rolled the dice with its public education system in major urban areas. Our nation has launched into an experiment that could fundamentally reshape public education for decades to come. For many proponents of increasing school choice, the motivation is the laudable goal of reducing the racial/ethnic achievement gaps. Behind these worthy individuals who are motivated by such a noble cause is the reality that as they approach educational reform they approach it in a context in which many other types of educational reform are already foreclosed by the Supreme Court's interpretations of the Equal Protection Clause.

Since at least 1974, when the Supreme Court handed down its opinion in *Milliken v. Bradley*,¹⁶¹ school desegregation experts have known that the Supreme Court's interpretations of the Equal Protection Clause halted and now are reversing the desegregation of public schools that occurred in the 1960s, 1970s, and 1980s. But the Court's decisions have done more than just stop the physical integration of public school students. Those decisions also limited and directed acceptable school reform by channeling it toward race-neutral programs.

The process-oriented approach to educational reform of the expansion of school choice may, as many of its proponents assert, ultimately prove to be tremendously beneficial to students from underrepresented backgrounds. But there is an element of desperation that must be acknowledged in this effort. Racial/ethnic achievement gaps have persisted, and some have actually increased, over the past fifteen years. The status quo can not be accepted by those who have the best interests of black and Latino school children at heart. Something must be done to attack the problem. Expanding school choice is one of the few avenues open for school reform.

¹⁶¹ *Milliken v. Bradley*, 418 U.S. 717 (1974).

